UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TEDDY VOLKSWAGEN OF THE BRONX, LLC,

Plaintiff,

v. 19 CV 2337 (AJN)

PHILLIP DEMERSKY,

Defendant. Conference

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New York, N.Y.
June 7, 2021
11:15 a.m.

Before:

HON. ALISON J. NATHAN,

District Judge

APPEARANCES

MILMAN LABUDA LAW GROUP, PLLC
Attorneys for Plaintiff
BY: EMANUEL KATAEV

RANNI LAW FIRM
Attorneys for Defendant
BY: JOSEPH J. RANNI

(Case called)

MR. KATAEV: Good morning. This is Emanuel Kataev of Milman Labuda Law Group, PLLC for the plaintiff, Teddy Volkswagen of the Bronx, LLC. It is such an honor to be back in person in court, your Honor.

THE COURT: Thank you, Mr. Kataev. Good morning.

We don't have anyone here on behalf of the defendant.

Just to provide a brief background of what occurred, I did receive a letter from you, Mr. Kataev, last week raising issues about preparations for trial which is scheduled to commence on June 28. I candidly was confused by some of the questions, had concerns about the matter being on track for our scheduled trial date.

So I put out an order on Friday morning indicating that I wanted to see the parties today so that I could try to understand what the questions were, any outstanding issues, make sure we are on track to proceed. I put that order out. I don't have the time that it was docketed, but it was Friday morningish. About 11:29 a.m. My clerk tells me.

Is that consistent with your memory, Mr. Kataev?

MR. KATAEV: That's exactly correct, your Honor.

THE COURT: That was Friday. The weekend passed.

This morning, at about 9:38 a.m., I received a letter request from defense counsel asking to adjourn today's proceeding because he had a deposition scheduled for today and

tomorrow.

Given my concern about needing to get the case on track and given the late hour, I presumed you might be on your way, Mr. Kataev. You later called chambers, before I put out a response to the request, indicating that you were on your way, so I put out an order denying the adjournment request. You confirmed receipt of that order, which my chambers e-mailed to both counsel to make sure it was expeditiously put in front of counsel.

I don't believe we have received a confirmation of receipt from Mr. Ranni, defense counsel.

Here we are. I don't know whether defense counsel received my denial of the adjournment request. We haven't heard additional word.

Have you spoken to defense counsel today, Mr. Kataev?

MR. KATAEV: Your Honor, this morning I received a voice message on my office line, which I received via e-mail from defense counsel that supports that. Antoinette McGee, we have a very cordial relationship, and we keep in contact.

Last week, on Friday, when the order came in, we had exchanged various e-mails about the upcoming trial. And in exchanging those e-mails Ms. McGee's automatic response indicated that she was out due to a death in the family. I expressed my condolences and received an e-mail thanking me for that after the voice message.

I called back while I was driving to the court and spoke to Ms. McGee.

THE COURT: That's today, you mean.

MR. KATAEV: That's today, this morning. She indicated to me that Mr. Ranni had depositions and that she would be making an adjournment request.

I asked Ms. McGee, since I was driving, to indicate that I was on the way, and I stated to her specifically, given the fact that she had a death in the family, I won't take any position on the request. She thanked me and she filed the letter.

I did review the letter after it was filed and noticed that it stated that I was on the way, past tense. I wanted to correct the record but was unable to do so in writing because I was behind the wheel. So instead I contacted the Court by phone and indicated that I still am on the way. As far as I'm concerned, as far as plaintiff concerned, there is an order to appear in person, and I will be so appearing.

I also informed the Court's support staff, I am not sure who I spoke to, that I would be asking the Court to allow the defendant to appear by telephone. I do have his cell phone number, and I would like to -- I don't know if it's possible, but I would like to ask the Court to order him to pause his deposition in order to conduct this conference because there are numerous issues here that need to be discussed, and I am

prepared to discuss those issues.

THE COURT: Why don't I step down for a minute. I'll ask Ms. Williams to see if she can get Mr. Ranni on the phone, and we will proceed from there. I am just trying to think if we should do it in the robing room. Why don't you try to get him on the phone. I'll step down. Thank you.

(Recess)

THE COURT: This is Judge Nathan. Do we have Mr. Ranni?

MR. RANNI: Yes, your Honor.

THE COURT: I do need you to speak up, Mr. Ranni. Could you put in your appearance, please.

MR. RANNI: Joseph Ranni, Ranni Law Firm, on behalf of defendant Demersky.

THE COURT: Mr. Kataev is here.

I started a few moments ago just running down the history of what led to the in-person conference. I scheduled for today, which I did schedule on Friday morning. As I indicated before you joined, the reason I wanted to have an in-person conference, I had received -- we are scheduled to proceed to trial on June 28. I had received a letter from plaintiff's counsel last week with a series of questions that I didn't fully understand and raised concerns if we are on track for trial to commence on the 28th. So I put out an order scheduling this conference on Friday morning for today, Monday,

at 11 a.m.

At 9:38 this morning I received a letter request from you, Mr. Ranni, asking to adjourn the conference. I denied that request, which is why we are proceeding today.

Did you receive my order scheduling this conference last week, Mr. Ranni?

MR. RANNI: I did not, your Honor. On Friday, Saturday, and Sunday, I was in a multidisciplinary certification program put on by Fordham Law School and University of Rochester that was from 8 a.m. to 6 p.m. every day. Then today I'm in a federally court-ordered deposition on a very important case, so I did not see your order. My assistant was out to a death in the family on Thursday and Friday. My apologies.

THE COURT: Your assistant, I understand, was aware of the conference, according to Mr. Kataev's recounting.

MR. RANNI: She told me this morning. She didn't know on Friday. She was at a funeral for her cousin who died a week after her aunt. So she was in no mental or physical condition last week or this weekend for anything. Two very close family members passed.

THE COURT: Mr. Ranni, your representation to the Court, as a member of the bar, is that you were not aware of this conference scheduled for today until today, or when specifically did you become aware of it?

MR. RANNI: I learned this morning.

THE COURT: What time?

MR. RANNI: When Antoinette came in the office.

THE COURT: What time?

MR. RANNI: I couldn't say specifically. I think it was about 9 a.m., quarter of 9, maybe as early as 8:30.

THE COURT: I am going to let it go. Obviously, if there is a death in the family and you were not made aware of it until today, it's understandable why there was a late request to adjourn. But, as I said, I denied the request. So we will proceed by phone now.

MR. RANNI: Thank you, your Honor.

THE COURT: Mr. Ranni, I put out a second order on Friday. Are you aware of that order?

MR. RANNI: I have not seen any e-mails, your Honor. I really rolled from the program, tried to prepare for this deposition today. It's really one of my most important cases. I haven't communicated with family in the past four days. I've really been very consumed and working very long hours.

THE COURT: Are you prepared to commence trial on June 28?

MR. RANNI: Your Honor, I will do what the Court directs.

THE COURT: Mr. Kataev, what is your position as to whether the parties are going to be prepared to commence trial

on June 28?

MR. KATAEV: Your Honor, plaintiff is ready to proceed with today's conference and the trial. We are on track to submit the remaining pretrial submissions due this Thursday, June 10.

There is an issue about the pretrial submissions that we need to discuss today, and I am also prepared, your Honor, to discuss the effect of the Supreme Court's decision in *Van Buren* on this case. I believe that having this discussion today will leave the Court with the firm conviction that plaintiff is prepared to proceed and is ready. Apart from us not finishing on Monday and requiring a second day, I don't see any other issues in terms of moving forward with the trial.

THE COURT: Mr. Ranni, I presume you don't know what the reference to the Supreme Court's decision in *Van Buren* is, or do you?

MR. RANNI: I do not. My question is, I haven't had a bench trial in federal court. My issues -- maybe it's just me being wrong, for which I apologize. I received plaintiff's exhibits or designations. It was my understanding that plaintiff puts forth what they need to prove, what affidavits, what information they are going to have in their case in chief. Then I am able to properly look at the evidence, figure out authentication, foundation and agree whether we have the exhibits or not, and then I'm able to determine what is

necessary for my case in chief. That is the way I understood it.

Mr. Kataev instead believes that I have to put in my case in chief simultaneous with what he's submitting. It just seems patently unfair and not appropriate due process because I am going to guess this evidence. I have been guessing at what this case is about from the very beginning as far as what his proof and evidence is. I don't know what his proof or evidence is.

THE COURT: You didn't move for summary judgment. I suppose if your position is, there is not even or evidence in the record, you could have asked for summary judgment. But I would have discouraged it, in any event. It may be not worth it.

Let me ask this. Have there been any exchange of trial testimony declarations, Mr. Kataev?

MR. KATAEV: As of this date, no, your Honor. But the deadline to do so has been extended until June 10.

THE COURT: I understand.

Tell me, Mr. Kataev, you have about five or six witnesses listed. Who do you anticipate calling as your witnesses?

MR. KATAEV: Plaintiffs anticipating calling on their case in chief solely the following two witnesses: Ted Bessen, the dealer principal and owner of the dealership, and Paranjit

Kalra. Plaintiff reserves the right to subpoena certain individuals but at this point does not anticipate doing so. The individuals that plaintiff would subpoena would be someone from VWFS Protection Services, Inc. It's an entity that we subpoenaed concerning the incentive rewards at issue in this case that are subject to the Computer Fraud and Abuse Act claim. We will be working to secure an affidavit from a custodian for purposes of admissibility, and there may be a need for a live witness for that, but we are still deciding that.

THE COURT: Mr. Ranni, who do you anticipate calling as your witnesses?

MR. RANNI: Well, once plaintiff finishes, likely Mr. Demersky because if he is calling Ted Bessen and he calls Ms. Kalra, that pretty much covers the case.

THE COURT: Let me ask this. Given the limited number of witnesses testifying and where we are at this stage, I am inclined, actually, to, and because you have not exchanged trial declarations, to forego that process, which is my typical process and, instead, just have direct testimony given live.

Any objection to that, Mr. Kataev?

MR. KATAEV: No, your Honor. Whatever the Court feels is proper for the trial. We are comfortable either way.

THE COURT: Mr. Ranni, any objection?

MR. RANNI: No objection. Thank you.

THE COURT: We will do that. That will simplify pretrial submissions.

Just to explain the process, I do in bench trials, typically, rather than having counsel prepare a direct testimony outline, and it's predictable what the witnesses within each counsel's control would say, I'll have you submit that in advance and just get to the heart of the matter through cross-examination. Again, where we are and the limited number of witnesses, I am comfortable foregoing that process and we will do it the old-fashioned way and just have direct testimony elicited live.

That takes care of that.

Mr. Ranni, you are required to indicate what exhibits you anticipate relying on for your case in chief. I think in the final pretrial order that you have proposed you have just indicated you are going to use what plaintiff has identified.

Nothing beyond that, Mr. Ranni?

MR. RANNI: No. We have no records beyond that. I do have certain objections to evidence that plaintiff may seek to submit, which is why I wanted to understand what they were looking to submit because we really had a lot of paper exchanged in this case, but very little of it relevant. It's not a heavy document case, and the defense really is just demonstrating that plaintiffs' documents don't support what they are contesting. I do not expect anything different, but I

do expect that I'll have objections to theirs.

THE COURT: If it's just relevance objections, we will take those as they come during the course of the trial.

There is an *in limine* motion pending. That's yours, Mr. Kataev?

MR. KATAEV: No, your Honor. That's the defendant's motion *in limine*. I'm happy to describe the motion if it helps the Court.

THE COURT: Yes. These are agreements, am I right? I forget the term used to describe them.

MR. KATAEV: There are essentially two components to defendant's motion *in limine*. I'll start with the agreements that you reference, your Honor.

The defendant moves *in limine* to preclude the addition of maintenance contracts and that's distinguished, your Honor, from warranties. Both are in play in this case and both are very separate for distinct reasons, which will be established at trial. But the defendant seeks to preclude the introduction of those maintenance contracts, and plaintiff opposes that.

THE COURT: Mr. Ranni, is that a relevance-based objection or something else?

MR. RANNI: No. It's actually authentication foundation because my client had nothing to do with those contracts, didn't get those contracts, didn't approve what they claim was approved by him in those contracts. There is

actually no personal action or additions or comments by my client in any of those contracts or warranties, and they are both done at the same time in a package. They are not separate and different. They were done by salespeople, approved by a sales manager, not my client, who is a general manager. He had no direct involvement with it. So it's a foundation authentication objection.

THE COURT: I'll take those up at trial. I will deny the *in limine* motions to the extent it's seeking resolution pretrial. But the objection is preserved and can be reraised once I see how plaintiff attempts to authenticate and lay a foundation for those documents.

Any questions with respect to that, Mr. Ranni?

MR. RANNI: None, your Honor.

THE COURT: Mr. Kataev.

MR. KATAEV: Just confirming that you don't need to hear argument on why the motion *in limine* should be denied?

THE COURT: No. I am denying it, as I said, for pretrial purposes, but the objections may be raised at trial.

MR. KATAEV: There is a second component to the motion *in limine*. I'll be happy to describe that to the Court.

THE COURT: Mr. Ranni, is there any other basis that you want to raise for the *in limine* motion?

MR. RANNI: I know my objections *in limine*, they were exchanged. I didn't have an opportunity to look at them. If I

get an opportunity, I promise the Court and counsel that I will fairly and objectively review any documents and try to avoid any unnecessary objections.

THE COURT: Thank you.

I think, Mr. Kataev, you indicated in your motion that you did send those over to defense counsel, correct?

MR. KATAEV: That's correct, your Honor.

Just to be brief about it, the maintenance contracts are inside deal jackets, which contain very voluminous amounts of papers concerning the sale of a vehicle or release of a vehicle. A lot of the documents within the deal jacket are irrelevant. We went through the painstaking process of culling only what was relevant, scanning and submitting it to the other side. It's about 600 pages of documents for about 50 deals, and we maintained in our office the original deal jackets with all papers inside, relevant and irrelevant, and have made them available for copying and inspection by the defendant.

We have also offered a deposition to the defendant of a 30(b)(6) witness of plaintiff to ask any questions about the maintenance contract so that we can avoid any arguments about the prejudice of a late production on June 4.

MR. RANNI: That's what that was. Yes. After all this time, they then transferred documents, hundreds of pages of documents that should have been exchanged a year and a half ago, and I guess right before, as part of the pretrial order,

and they at the point to use that.

Even the objections in court, if the Court recalls the discovery fights that we had in this and the production of records and that the defendant was chasing the records, chasing these records included, because we had always said that he had no involvement in these records.

Now we get the complete maintenance agreements, which I assume will demonstrate that he had no involvement. I may not have an objection. I'll try to work with it. But the late production, a year and a half, of an important issue and it is being exchanged, as a well as a pretrial order.

What frustrated me was that, I was looking for the extensions for reasonable, I thought reasonable -- I understand why it was denied. But the plaintiff was objecting to those extensions and here we are, after those -- at the very last minute now they are exchanging all the documents. That's sandbagging and it's not fair. It's prejudicial. That's my objection. There was a motion *in limine* for that.

THE COURT: Not, as you said a moment ago, just authentication and foundation.

MR. RANNI: And also the untimeliness of it, your Honor, as far as the prejudicial nature.

THE COURT: There is a lot of untimeliness going both ways. I can only cross the bridges that are in front of me.

MR. RANNI: I'll retain the right to object as to

authentication and foundation.

After Wednesday, when I finally return to my life, I promise I will review the documents and make my best effort in a professional, courteous manner.

THE COURT: Just looking at the calendar, if you are going to continue your objection based on an untimeliness, I'll order that I hear from you on or before June 14, which is next Monday.

MR. RANNI: That would be fine, your Honor. Thank you.

THE COURT: You'll do your best to avoid unnecessary objections. I appreciate that.

While I have you, Mr. Kataev, why weren't these produced until after the close of discovery?

MR. KATAEV: Your Honor, very simple. There is no order compelling us to produce this discovery.

THE COURT: My apologies. Was it requested as part of discovery and then no motion to compel was filed? Is that what you are saying?

MR. KATAEV: As far as I understand, your Honor, in reviewing the plaintiff's responses to defendant's discovery demands, all of the deal jackets were requested with all the documents inside. The plaintiff objected based on overbreadth and burden and, notwithstanding those objections, agreed to provide a sampling of some of the deal jackets in order to

prove that these contracts were not booked into the deal as a cost.

I don't recall whether this was done, but I do recall that at the deposition, when reviewing this discovery, the deposition with the plaintiff, the defendant's counsel demanded production of all the maintenance contracts. I responded that I would like for the defendant to follow up in writing. The defendant never did so.

As far as I'm concerned, as far as the plaintiff is concerned, there was no order, there was no real valid request, at least one that was followed up on, and, therefore, there was no obligation to produce everything.

However, as a matter of good faith in advance of the trial, which has been produced practically a month in advance, we have provided the defendant with scanned copies with either originals available for copying and inspection. It's just one bankers box full of maintenance contracts. It's not very voluminous. We have also offered the deposition.

In that regard, despite the fact that plaintiff maintains there is no prejudice to defendant, to the extent there is any prejudice, all of that has been sort of mitigated by plaintiff's conduct in allowing defendant to understand the documents.

THE COURT: Mr. Ranni, just a moment.

Mr. Kataev, did you include the documents as a part of

your initial disclosures under Rule 26?

MR. KATAEV: Your Honor, I did look at the initial disclosures. And I guess in my desire to be overly broad, I did not really specify in much detail the word maintenance contracts where deal jackets do not appear in the disclosures, but I would argue that the way those disclosures are worded, it does permit me to produce these documents.

THE COURT: That sounds like it may be an issue. I'll ask counsel to do their best to work it out. If these are relevant documents and the defense not prejudiced, I would like to figure out a way to move forward, but there may be issues.

Mr. Ranni.

MR. RANNI: If I could make one quick point. They didn't produce them because they objected that it was overbroad. During the deposition we are talking about, the primary issue concerning these warranties and maintenance, we don't disagree that they were given on those deals. This was a typical thing that was given on many deals, but none of it was ever decision making of my client.

That's why I wanted the documents way back when, because they are voluminous, and I can go through it and demonstrate that my client's fingers aren't in any of it.

But now, you know, this is sandbagging. I get it shortly before. It's hundreds of pages. But I will go through it and I will try to work through it professionally,

cooperatively, and minimize objections, but be that as it may.

THE COURT: I'll hear from you, please, by June 14 if there is a continuing objection.

Mr. Kataev, to the extent that the dispute is whether Mr. Demersky had specific involvement in these documents, if that's uncontested, you can work out a stipulation to that effect.

MR. KATAEV: Your Honor, it's a tough thing to work out. A general manager is considered the top dog in the dealership. Everything goes through the general manager. It's his responsibility to oversee the operations of the dealership. That's not in dispute, your Honor. He admits that at his deposition.

For him to absolve himself of any responsibility of what's inside a deal jacket because he relied on a sales manager is dereliction of his duties. He has to make sure the sales managers and the salespeople are doing the right things.

He sent documents at the beginning of his employment concerning what's inside the deal jacket and how to properly record everything in the deal. We are holding him to that responsibility, both what's in the policies that he signed and just as a general common-sense nature of his duties. He has to make sure that everything is done properly. He is allowed to delegate his duties, but he is not allowed to absolve himself of his duties. Again, it sounds like there might not actually

be a factual dispute as to what occurred, but what arguments you want to make from his responsibilities and the like.

MR. RANNI: This court case is not about whether Phil Demersky did a good job or bad job. He wasn't fired. He voluntarily left. Then this came after.

The claims that they are bringing, they have to show intentional acts and that he defrauded and all these types of things, not that he just did a bad job. He is asserting in federal court whether he did a good job or a bad job, but that is not the claim. The federal claim is that he misused the computer and the computer system and that he misused or changed the passwords, which they never produced during the course of discovery or even now.

That is why this Court has jurisdiction. That's the claim that they have to prove, not that he's a bad employee, which, if they were going to bring that, they should have brought it in New York Supreme, not federal court.

THE COURT: I can assure you I am only going to apply the law. If there is subject matter jurisdiction here, as a result of the computer fraud, the CFAA statutory provision, then the state law claims, of course, are here as a matter of supplemental jurisdiction.

When you pay attention to the order I put out last Friday, Mr. Ranni, the second order I put out noted that the day earlier the Supreme Court issued an opinion on the meaning

of exceeding authorization under the CFAA. It arguably narrowed the interpretation, and some of the cases that Mr. Kataev cites in his pretrial memorandum are cases that ended up on the wrong side of that circuit split. I don't know factually what is in issue here, but certainly it raised the question in my mind as to whether this federal claim has a basis for proceeding.

MR. RANNI: If there is a change of law, then maybe it would be appropriate for a motion and for us to bring up that particular issue. I'm sorry to be ignorant and I'm sorry not to have read your order, your Honor. I'm truly sorry. But maybe that would obviate the need for a trial.

THE COURT: Mr. Kataev.

MR. KATAEV: Your Honor, I'd like to have a discussion on procedural grounds and then substantive grounds.

THE COURT: Sure.

MR. KATAEV: Procedurally speaking, as far as I'm concerned, when Mr. Ranni became an attorney admitted to the Southern District of New York and got signed up with that electronic case filing system, there is an absolute obligation for him to review everything that comes in. As far as I know, your Honor, ECF bounces, and orders that come through go directly to his e-mail, so the e-mail is successful on his phone.

MR. RANNI: I have that.

THE COURT: Mr. Ranni, you may not interrupt. You'll have to wait. I will make sure everybody gets a turn, but no one may interrupt.

MR. RANNI: My apologies.

MR. KATAEV: As far as I'm concerned, your Honor, even if Mr. Ranni was tied up from 8 to 6 on Friday and then the same times Saturday and Sunday, he had the opportunity to review his e-mails on Friday evening, and he could have given the courtesy to this Court and to me, who went through painstaking efforts to get here on time -- if I recount that, that would be a very interesting story -- to at least advise the Court that he is unable to make it today.

I would like for an order to be issued that Mr. Ranni has an independent obligation to ensure that he reviews all orders that come in and not delegate that responsibility to support staff. It's funny. The defense counsel is like the defendant here in absolving themselves of responsibility based on their support staff's obligations.

THE COURT: You heard where I started --

Mr. Ranni, I'm speaking.

MR. RANNI: I'm sorry, your Honor.

THE COURT: You heard where I started this conference, which was trying to figure out why Mr. Ranni wasn't here, as I had ordered. We went through that. I am allowing him to proceed by phone, so we are here by phone. What I said I would

hear today is on the issue of the impact, potential impact of *Van Buren*.

Mr. Kataev, I gather you are prepared to make presentation.

MR. KATAEV: Yes, your Honor.

THE COURT: In a moment I'll give you an opportunity to do that.

Mr. Ranni, is there something you need to say before I give Mr. Kataev that opportunity?

MR. RANNI: No, your Honor.

THE COURT: Thank you.

Go ahead, Mr. Kataev.

MR. KATAEV: OK, your Honor.

Last Thursday the Supreme Court of the United States decided the case *United States v. Van Buren*. In that case a police sergeant working for a police department, who did have authorization to use his computer issued by the police department, which there is no dispute over, and who did have authorization to use the computer program to run license plate searches, which there is no dispute over, and who did that use that access improperly, was found to have not violated the Computer Fraud and Abuse Act because he had authorization to use the computer, and he had authorization to use the program within the computer.

THE COURT: Then he used it for improper purposes and

that's what the Court said was not within the meaning of the statutory provision?

MR. KATAEV: That's exactly correct. It was a violation of the police department's policy, but the Court found that it was not a violation of the Computer Fraud and Abuse Act.

This case is markedly different for several reasons. As an initial matter, this Court still has subject matter jurisdiction because there is a federal question right now as to whether the defendant violated the Computer Fraud and Abuse Act.

It's too late to file a motion under Rule 12(c) because it would delay a trial. If the defendant wanted to move, I would only ask that the trial proceed and that the decision on the motion be held in abeyance. And this Court already ruled in its decision dismissing the counterclaim that it's too late to file a motion for summary judgment, which defendant undertook no steps to take.

Going to the merits of the case here, this case is not like *Van Buren*. It's more like *Nixon*. What happened here is that we don't know whether the defendant had authorization to use the computer because he denies ever accessing the system at issue here. If he used the dealership's computer while he was employed, then he had authorization. We allege in the complaint that he accessed it after his employment, in which

case he would not have authorization.

Moreover --

THE COURT: Let me just pause to make sure I understand.

To prove your claim under CFAA you will put in evidence that his unauthorized access of your client's computer occurred after he left his employment and, therefore, had no authorization to access.

MR. KATAEV: We will argue that by inference from the evidence that we do have. We do not have conclusive evidence that he actually did so, but we will argue by inference from the evidence that we do have so that he did so after the fact.

THE COURT: Give me a proffer as to that evidence.

MR. KATAEV: Mr. Demersky resigned on or about July 23 of 2018. The evidence that we will present will show that after his resignation he received a payment in August of 2018 and September of 2018 for monies that were supposed to go to the finance and insurance, what we call F&I in the dealership realm. So the F&I manager, those incentive rewards which were paid directly from Volkswagen were historically and always paid to the F&I manager.

In order for that to happen, the dealership had to sign a special agreement to allow the F&I manager to receive those payments because, as a matter of right and as a matter of contract, those monies are the dealership's monies, not the

employee's monies. So the dealership, as a matter of good faith to its employees for selling warranties, which are distinguished from maintenance contracts, for selling warranties, allowed Volkswagen's incentive payments to go directly to the person who is in charge of selling them.

Mr. Demersky is a general manager. He doesn't sell warranties. He was never entitled to receive this. Even more importantly, he admits at his deposition that he was never entitled to receive any of these monies. And he admits at his deposition that the only way to receive those monies was on authorization of ownership. He does not claim, like Van Buren can in his case, that he has the authority to enter this system, to change anything in the system.

THE COURT: I don't understand what that has to do with the timing issue. Your paragraph topic sentence was --

MR. KATAEV: I veered off field.

THE COURT: Which suggests a weakness in the argument, to be honest. If the conclusion doesn't match up with the topic sentence, there is something wrong in between the two.

You started by saying that you were going to prove lack of authorization, which I think is your obligation to establish by a preponderance of the evidence from the inference that payments were made in August and September and he resigned in July. Is that right?

MR. KATAEV: That's correct. But even if we don't

prove that, we still prevail under the Computer Fraud and Abuse Act claim. Here is why. Even if Demersky accessed the computer he was authorized to access, if he gets on the stand and we are unable to rebut that he used the dealership computer and he did it during his employment and he made this change, the fact of the matter is that the system that he accessed were business computers. He was never authorized to access this. He admits at his deposition he was never authorized to access it.

THE COURT: The it is like an application that you click on and you go in and enter information?

MR. KATAEV: That's correct, your Honor. I'm glad you brought that up. There are three systems. They are all web based, and they all require a user name and password to enter them, much like you would use for Gmail or for ECF.

One of the systems is called VW Hub. That's for maintenance contracts. Demersky admits at his deposition that he did have access to enter that system.

THE COURT: He had a user name and password?

MR. KATAEV: That's correct.

Another system is called Volkswagen Direct. I think that has to do with sales, I'm not sure, but that's not an issue here. He did say that he has access to that system.

The third and final one is the Volkswagen Drive Easy Portal, which also requires a user name and password in which

Demersky states at his deposition unequivocally, I never had a user name and password, I didn't have any authority to enter that system, and I never did enter that system. Yet, we have evidence that the defendant received over $5,000 in compensation from January of '18 through September of 18.

THE COURT: His factual claim is that he didn't enter it.

MR. KATAEV: I refer to his defense as the Shaggy defense, your Honor. It wasn't me. I didn't do it.

THE COURT: My nomenclature is that factually he is asserting he didn't enter it. That's not enough. You need me to disbelieve that in order for you to prevail.

MR. KATAEV: That's correct.

THE COURT: That leaves the question of whether he was authorized to access it, and you've got to prove to me, and it's like a proffer, other than his testimony that you want me to discredit, what you will point to to show that he was not authorized to access that.

MR. KATAEV: Your Honor, there is one thing that we do agree with on both sides is that Demersky does not have authorization to enter the Volkswagen Drive Easy system. He admits that.

THE COURT: You want me to rely on his testimony as to that.

MR. KATAEV: No, your Honor. We have documentary

evidence of that as well. That's all in the discovery that we submitted to the defendant, not the new discovery with the maintenance contract.

THE COURT: I'm just asking for a proffer. At the end of the day you'll put it in and you'll say, Judge, for the element where we have to prove that he wasn't authorized, here are the documents or the testimony you should look at. What will that be?

MR. KATAEV: It will be the contract between the dealer and VWFS Protection Services, Inc., which explicitly states that it's the dealership's money unless they enter into a dealership override agreement and it will be the testimony as well. And there are also some e-mails exchanged that make it clear that what Demersky did, he knew what he was doing, and he did it on purpose in order to obtain these monies.

THE COURT: I will just tell you my gut. I'll see how it comes in. But my gut reaction is, that's not going to be enough to show that he didn't have authorization to enter that portal. It existed on his computer, I assume. He is the general manager. I don't know if he had any responsibilities that would ever require him going in there, even if it were to review what others did and the like. But you are going to have to show, I think, relying on testimony other than his, which you are asking me not to credit, that he was unauthorized to access that portal.

MR. KATAEV: Allow me to sweeten the pot further, your Honor. Demersky states at his deposition that prior to working at Teddy Volkswagen, he worked for another Volkswagen dealership. At that dealership he was aware of the incentive program and had a special debit card in which Volkswagen placed this incentive money on. The way the incentive money is received is on a prepaid debit card. He claims at his deposition that to the extent he received any money from any incentive program, that's where it went, and he specifically denies receiving any money from the Drive Easy F&I rewards program. Our documentary evidence shows conclusively that he did receive.

THE COURT: If the Supreme Court had come out the other way, all of that would be highly relevant, I think, to the question of whether he was violating policy in exceeding his access to something that he was able to access. The Supreme Court in cases you cited are no longer good law. The Supreme Court came out the other way. It doesn't mean you can't make out your claim.

But I'm asking what your proffering evidence is as to the notion that in his job, as general manager, on that computer where that portal existed, that he was not authorized to access it.

What I hear you saying is, he testified that he never did. He testified that he never had a user name and password.

He did have access to it in his prior job at Volkswagen, but he is denying that he did now. I sit here fully with an open mind, but you are circling around, I think, the key issue.

MR. KATAEV: I am going to fine-tune it because I think it's important for the Court to understand.

THE COURT: Sure.

MR. KATAEV: In order for him to have authorization, he has to have a user name and password. The lack of a user name and password that was granted by the dealership to Demersky means that he did not have authorization to enter that system.

THE COURT: Without a user name and password you can't enter the system?

MR. KATAEV: That's correct.

THE COURT: Did he have a user name and password?

MR. KATAEV: He alleges -- withdrawn. He avers in his deposition that he never accessed it and did not have access to it.

THE COURT: But you contest -- you are going to put on evidence that he did, right?

MR. KATAEV: I am going to put on evidence that he improperly accessed it, that's correct.

THE COURT: How did he do that? What does the evidence show as to how he did that?

MR. KATAEV: The evidence shows that Mr. Demersky,

without informing anybody else at the dealership and without receiving permission, reached out directly to Volkswagen, contacted Volkswagen in order to set himself up with access and unilaterally change things that he admits he did not have authorization to do. Therefore, the second prong of the CFAA is met.

The first prong is, he didn't have authorization to use the computer. So that's a live issue as far as I'm concerned, depending --

THE COURT: That's the timing issue.

MR. KATAEV: Correct.

THE COURT: If he's accessing --

MR. KATAEV: That's correct.

THE COURT: You want me to infer that he had no authorization since the inference is he's accessing after he has left --

MR. KATAEV: Exactly.

The second issue is, even if he did have access to this computer and had authorization to use that computer, he did not have authorization to enter that Drive Easy Portal.

Therefore, this case is different from *Van Buren* because in *Van Buren* the defendant there had access to both the computer and access to the underlying system, whereas here, even if he did have access to the computer, which is still a live issue, he admits, and there is no dispute whatsoever, that

he did not have access, that he wasn't authorized to access the underlying system.

THE COURT: Go ahead, Mr. Ranni.

MR. RANNI: Judge, authorization was given by the employer. The Drive Easy program is one where you have access to look at information, but no access to change it. The Drive Easy and the direction of the money was by Teddy Volkswagen. He had access to see information. He had no access to determine where money went, how it went, who would otherwise get it, number one.

The timing issue. It's undisputed evidence. They locked him out of this system when he left. The money he got paid was for work previously performed, before he got fired. There was no subsequent access. To whatever extent he got paid, that was determined by the employer. He had no involvement. And that's just it.

Under *Van Buren*, it's right on point, except that he never exceeded even his authority. So he has a computer. He has the access. They provided it. He acted in accordance with the access he had and that's that. He never went in with Volkswagen and changed the access or password. He wouldn't have authorization to make those changes and never did. Never did.

THE COURT: I understand.

MR. RANNI: The money he got was clearly paid for work

performed before because Ms. Kalra got the money after.

THE COURT: I understand. We are not going to resolve this now. There are factual disputes here. I think *Van Buren* may very well change the calculus as to the second prong. Again, it doesn't mean you can't meet it. If your briefing relies on cases that are now no longer good law, it's a sign. It's a factual dispute as to whether or not he had authorization.

I'll note Mr. Kataev's intention. You want to rely on his testimony to say he didn't have access to it, but rely on that same testimony to say that he's lying about the fact -- you want me to discount it to say that he did not access it. It's an issue. You obviously have looked at it. It sounds like it's what will be argued once the facts are in evidence.

MR. RANNI: If I may, your Honor.

THE COURT: Go ahead.

MR. RANNI: I think the Court's question on the proffer was extremely prescient. What evidence do they have to shows that he went in, Phil Demersky went in and altered a password or access so he could receive money. What is that evidence? Because that's what their claim entirely is lynched to. That they don't have, never had it, never produced it, and they don't have it now. It doesn't exist.

I think a motion on *Van Buren* would be appropriate because I think it would demonstrate that plaintiff has no

*prima facie* claim anymore and the change in the law, I think, permits the variation on procedure to allow a motion at this point because it can obviate the trial because it's a primary issue in the trial.

MR. KATAEV: I have a response to that.

THE COURT: Go ahead.

MR. KATAEV: I don't disagree that briefing is crucial in this case, but I don't agree that it requires a postponement of the trial. I respectfully submit the trial should move forward and that upon completion of the trial the Court allow the parties to submit posttrial briefs, specifically posttrial proposed findings of fact and conclusions of law to aid this Court in making a determination on the merits.

I just have one final point on the viability of the Computer Fraud and Abuse Act claim. Even if the Computer Fraud and Abuse Act claim goes, I respectfully submit that at this point this Court should exercise its discretion in favor of retaining supplemental jurisdiction because we are already at trial and the only thing that will result in dismissing the Computer Fraud and Abuse Act claim and remanding the remaining state law claims is for this case to languish in state court when it is ready for trial on a full decision on the merits and for the plaintiff to receive the day in court.

Your Honor, the old adage is justice delayed is justice denied. I don't believe that at this point any further

continuance or adjournment of the trial is necessary. This case needs to be decided, and we are prepared to move forward.

MR. RANNI: Your Honor, the Court's time and the litigants' time. I represent an individual. He doesn't have deep pockets. On an issue of law that is critical on evidence that plaintiff would necessarily have to produce or would necessarily be of a documentary nature, to go forward with a trial and waste the Court's time and resources and seek factual testimony, I think it's just a waste of judicial economy, especially when the key issue is a piece of evidence that plaintiff necessarily must have now and could be resolved with simple motions.

This has been nothing but intense burden and cost and the misuse of the federal court jurisdiction for a claim that never existed to begin with, *Van Buren* or not. Whether it languished in state court, that's where this case should have been brought, but it never would have been brought because there is no basis to state a claim anyway.

Defendant does want the plaintiff to be sanctioned because there is no evidence or it will be shown that there was no evidence and that can be demonstrated through a simple motion.

THE COURT: Mr. Ranni, I am not going to sanction. You could have sought to bring a summary judgment motion if your argument is *Van Buren* or not. You were untimely in that,

which is why I didn't allow it. I do also generally discourage it for bench trials because it's just doing the same thing twice.

That said, we have an unusual situation here, which is the Supreme Court just this week issued a decision directly on point to the federal claim.

Mr. Kataev is right. Certainly if we proceed to trial, even if the federal claim is out, I can't imagine I wouldn't exercise my discretion to resolve the state claims.

Pretrial it's a different posture, so that's why the decision whether to allow briefing at this point is an important one. I am going to think about that. Here is what we are going to do.

Mr. Ranni, you are going to put in a letter by Monday indicating whether you are going to maintain that objection to the maintenance contracts and warranties based on the failure to produce them prior to June 4 and during the discovery. Mr. Kataev's argument is, you didn't ask for them, so he wasn't required to turn them over.

Mr. Kataev, I am going to ask you to put in a letter with a factual proffer by Monday that details what evidence, both documentary and testimonial evidence, you believe will develop at trial from which your CFAA claim could prevail.

MR. KATAEV: Your Honor, if I may, I'd like to request that in lieu of a letter I just submit a revised proposed

findings of fact and conclusions of law. Your rules require that the evidence supporting each proposed finding of fact be there. Currently the one that we submitted does not have that. I intended to supplement it. In lieu of a letter, may I do that?

THE COURT: Yes, you may do that. Obviously, I am not asking for trial declarations, so you can't cite to those. You can cite to deposition testimony.

MR. KATAEV: That's all I need, your Honor.

THE COURT: I'll see that by Monday as well, and then I'll let you know at that point -- I suppose, Mr. Ranni, I'll give you -- I think what I'll do is, I'll just look at that and decide, based on it, whether I want to proceed to trial or postpone trial and order briefing on the impact of *Van Buren*.

Any objection, Mr. Ranni?

MR. RANNI: None.

THE COURT: Mr. Kataev.

MR. KATAEV: No objection, your Honor.

THE COURT: I think that is what we need to resolve today.

It's a bench trial, so I can't involve myself in settlement discussions. You will let me know if you would like to return to the magistrate judge for that effort. I certainly think that it's worth having a discussion with each other and see if there is any possibility of saving the resources and

moving them rationally towards some resolution of the case. That's my only input on that. You let me know if you would like to go back to the magistrate judge or if there is anything else the Court can do to be of assistance. OK, Mr. Kataev?

MR. KATAEV: Yes, your Honor. For the record, plaintiff is always prepared to discuss settlement. We have indicated what the settlement negotiation has been in letters to the Court, so I won't belabor them here.

MR. RANNI: That's not true.

MR. KATAEV: If defendant is agreeable, we will appear before Magistrate Judge Netburn and discuss settlement.

MR. RANNI: The plaintiff put a precondition to settlement discussion. That's not always available for discussion. There were preconditions.

THE COURT: Mr. Ranni, are you open to going back to Judge Netburn for a discussion, given where we are?

MR. RANNI: I would, your Honor, but without preconditions.

THE COURT: Mr. Kataev.

MR. KATAEV: I am not sure what he means by preconditions. But if he is willing to discuss settlement, we will move and discuss settlement.

THE COURT: I think the referral is still out. If it's not, I will reopen the referral. I will let Judge Netburn know that you'll be in touch to see about whether a quick

phone -- she can't get you in person, but let's just try to do it in the next couple of days, if she is available.

OK, Mr. Ranni?

MR. RANNI: Yes, your Honor. That's fine.

THE COURT: I appreciate your efforts there. Obviously, if resources can be more rationally allocated to a settlement rather than trial, that's great. If not, we will get to trial as soon as we can after I have considered whether there should be some briefing on the impact of the Supreme Court's decision last week in *Van Buren*.

Mr. Kataev, is there anything else I can address?

MR. KATAEV: No, your Honor. I want to thank you for the inordinate amount of time you gave to this case today.

THE COURT: Of course.

Mr. Ranni, anything else?

MR. RANNI: No. And thank you very much to the Court for your courtesies, and my apologies.

THE COURT: Thank you, counsel. We are adjourned.

(Adjourned)